

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

STATE OF NEW MEXICO, <i>ex rel.</i>)	
State Engineer)	
)	
Plaintiff;)	69cv07941-BB-ACE
)	
vs.)	RIO CHAMA ADJUDICATION
)	
ROMAN ARAGON, <i>et al.</i>)	OHKAY OWINGEH CLAIMS
)	
Defendants.)	

**ANSWER OF EL BARRANCO, LLC
TO SUBPROCEEDING COMPLAINT OF OHKAY OWINGEH**

Defendant El Barranco, LLC, by and through its counsel, White, Koch, Kelly & McCarthy, P.A., hereby answers the Subproceeding Complaint of Ohkay Owingeh (Pueblo of San Juan) filed April 30, 2007 (Document 8634) as follows:

1. El Barranco denies that Ohkay Owingeh owns aboriginal use rights, admits that Ohkay Owingeh is a federally recognized Indian tribe and is without sufficient information or knowledge to either admit or deny the remaining allegations contained in Paragraph 1 and therefore denies the same.

2. The allegations contained in Paragraphs 2, 3, 4, 5, 6, 7, 9, 12, 13, 14, 18 and 19 are denied.

3. El Barranco is without sufficient information or knowledge either to admit or deny the allegations contained in Paragraphs 8, 11, 14, 15 and 16 and therefore denies the same.

4. El Barranco denies that Ohkay Owingeh is entitled to in-stream flows in the Rio Chama as set forth in paragraph 10 of the United States' Subproceeding Complaint which is incorporated by reference in paragraph 10 of the Pueblo Subproceeding Complaint. El Barranco

is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations incorporated by reference in paragraph 10 of the Pueblo Subproceeding Complaint and therefore denies same.

5. El Barranco denies that Ohkay Owingeh is entitled to in-stream flows in the Rio Chama as set forth in paragraph 17 of the Pueblo Subproceeding Complaint. El Barranco is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations set forth in paragraph 17 of the Pueblo Subproceeding Complaint and therefore denies same.

6. All allegations not expressly admitted herein are denied.

First Affirmative Defense

Pursuant to the Treaty of Guadalupe Hidalgo, the rights of Ohkay Owingeh, under federal law, to divert and use the water of the Rio Chama Stream System for all purposes cannot exceed those rights that were vested under Mexican Law as of May 13, 1846.

Second Affirmative Defense

The rights of Ohkay Owingeh, under federal law, to divert and use the waters of the Rio Chama Stream System for all purposes do not include the right to increase its diversion and use of water from the Rio Chama Stream Systems in excess of the maximum annual quantity of water lawfully diverted and used by Ohkay Owingeh pursuant to its vested rights under Mexican Law as of May 13, 1846.

Third Affirmative Defense

The rights of Ohkay Owingeh, under federal law, to divert and use the waters of the Rio Chama Stream System for irrigation purposes cannot exceed the maximum annual quantity of

water lawfully diverted and used by Ohkay Owingeh for such purposes between May 13, 1846, and June 7, 1924.

Fourth Affirmative Defense

The rights of Ohkay Owingeh, under federal law, to divert and use the waters of the Rio Chama stream system for domestic, livestock watering, or any other non-irrigation purpose cannot exceed the maximum annual quantity of water lawfully diverted and used by Ohkay Owingeh for such purposes between May 13, 1846, and June 7, 1924.

Fifth Affirmative Defense

The rights of Ohkay Owingeh, under federal law, to divert and use the waters of the Rio Chama stream system do not include the right to divert and use groundwater, except to the extent that Ohkay Owingeh has established such a right by the lawful diversion and use of groundwater under the laws of Mexico or the Territory or State of New Mexico.

Sixth Affirmative Defense

Any diversion and use of water by Ohkay Owingeh initiated after May 13, 1846, in order to be lawful, must have been pursuant to the laws of the Territory or State of New Mexico, specifically including requirements under Territorial or State law to obtain a permit from the Territorial or State Engineer for the diversion and use of surface water after March 19, 1907, and requirements under State law to obtain a permit from the State Engineer for the diversion and use of groundwater within the Rio Grande Underground Water Basin after November 29, 1956.

Seventh Affirmative Defense

Any claims of Ohkay Owingeh to uses of water that may be supplied from other sources, including the Rio Grande, the Rio de Truchas and the Rio Santa Cruz, may not be claimed from the Rio Chama stream system.

Eighth Affirmative Defense

Any claims of Ohkay Owingeh to uses of water from the Rio Chama stream system that may be supplied by federal project water, including from the San Juan-Chama Project, shall be reduced by the amount of such federal project supply.

Ninth Affirmative Defense

Any claims that Ohkay Owingeh had or may have the right to divert and use the waters of the Rio Chama stream system are barred by the doctrine of estoppel.

Tenth Affirmative Defense

Any claims that Ohkay Owingeh had or may have the right to divert and use the waters of the Rio Chama stream system are barred by res judicata or by the doctrines of claim or issue preclusion.

Eleventh Affirmative Defense

Any claims that Ohkay Owingeh had or may have the right to divert and use the waters of the Rio Chama stream system are barred by the doctrine of laches.

Twelfth Affirmative Defense

Any claims of the United States that Ohkay Owingeh had or may have the right to divert and use the waters of the Rio Chama stream system are barred by the doctrine of waiver, the doctrine of abandonment and forfeiture and by adverse possession.

Thirteenth Affirmative Defense

Any claims that Ohkay Owingeh had or may have the right to divert and use the waters of the Rio Chama stream System are barred by prior compromise and settlement.

Fourteenth Affirmative Defense

The claims of Ohkay Owingeh are barred by Treaty of Guadalupe Hidalgo and Article VI of the Constitution of the United States.

Fifteenth Affirmative Defense

The claims of Ohkay Owingeh, if recognized in whole or in part, would result in taking or impairment of valid and existing water rights of El Barranco without due process of law in violation of the Constitution of the United States and the State of New Mexico.

Sixteenth Affirmative Defense

The claims of Ohkay Owingeh, if recognized in whole or in part, would deprive El Barranco and other water right owners of the equal protection of the law in violation of the Constitution of the United States and the State of New Mexico.

Seventeenth Affirmative Defense

El Barranco has valid and existing water rights under New Mexico state law.

Eighteenth Affirmative Defense

Use of any water right quantified to Ohkay Owingeh must be done in such a way as to eliminate any impacts to non-Indian water users, including El Barranco.

Nineteenth Affirmative Defense

Administration of any water right quantified to Ohkay Owingeh or the United States on its behalf shall be under New Mexico state law pursuant to the McCarran Amendment, 43 U.S.C. 666.

Twentieth Affirmative Defense

The claims of Ohkay Owingeh are barred by the laws and customs of the prior sovereigns of Spain and Mexico.

Twenty-First Affirmative Defense

The claims of Ohkay Owingeh may be barred or limited by the Pueblo Lands Act of 1924 and the 1933 Act and by decisions of the Indian Claims Commission.

Twenty-Second Affirmative Defense

The claims of Ohkay Owingeh are limited by the requirement of application of water to beneficial use.

WHEREFORE, Defendant El Barranco respectfully asks this Court to require the United States to require Ohkay Owingeh to prove all elements of the water rights that it claims and to adjudicate the water rights of Ohkay Owingeh in accord with the laws, customs and judicial decisions of Spain, Mexico, the United States of America, and the Territory and State of New Mexico.

Respectfully submitted,

WHITE, KOCH, KELLY & McCARTHY, P.A.

By: _____/s/
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2007, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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AND I FURTHER CERTIFY that on such date I served the foregoing pleading on the following non-CM/ECF Participants via first class mail, postage prepaid addressed as follows:

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